86-697 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ST. LOUIS HOME INSULATORS, JOHN HOFFMAN, PAUL HOFFMAN, GENE WHITEHEAD, ROBERT GRYZMALA, DAVID MADDOX, d/b/a THE BEAR COMPANY,

Petitioners,

vs.

BURROUGHS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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H6P12

QUESTIONS PRESENTED

Did the District Court repeal Missouri law by implication in dismissing this lawsuit, only partially heard, without consideration of evidence to show the cause was timely filed, and does the action of the Court amount to such a drastic departure from the usual course of judicial proceedings to warrant reversal pursuant to the supervisory power of the Supreme Court?

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OPINIONS BELOW

The opinion of the District Court is reported at 597 F. Supp. 100 (E.D.Mo. 1984). The opinion of the Eighth Circuit United States Court of Appeals is found at 793 F.2d 954 (8th Cir. 1986).

JURISDICTIONAL STATEMENT

The judgment of the District Court was entered on October 5, 1984, and Appellants timely appeal was denied on June 18, 1986. Appellants' Petition for rehearing was denied on July 31, 1986.

Jurisdiction in the Supreme Court is based upon 28 U.S.C. 1254(1) in that a final judgment in the civil case has been rendered by the Eighth Circuit United States Court of Appeals.

STATUTES INVOLVED

The Revised Statutes of Missouri Sections 516.100 and 516.120 are included in the Appendix.

STATEMENT OF THE CASE

Petitioners, a group of businessmen engaged in the home insulation business, filed this action in 1983, alleging fraud in connection with a purchase of computers from Defendant Burroughs. They alleged that their discovery of the fraud was delayed until 1982 because Burroughs concealed from them critical data to show that the computer system could not perform as represented and because an independent evaluation of Burroughs performance could not be made until substantially more powerful hardware was installed in late 1982.

Burroughs moved for summary judgment on all claims and their motion was taken with the case. However, the Court declared a mistrial, *sua sponte,* after three days of testimony and before the testimony of at least two important Plaintiffs' witnesses was had.

After the truncated trial, the Court denied Defendant's Motion for Summary Judgment, holding the fraud claim a matter for jury determination. The Court directed, however, that the circumstances of fraud be pleaded with greater particularity. On October 5, 1984, the District Court dismissed with prejudice the

fraud claim as amended on the ground that the circumstances of fraud remained inadequately pleaded and that the claim was time-barred as a matter of law.

On appeal, the order of dismissal was sustained by the Eighth Circuit United States Court of Appeals, with a dissenting opinion by the Honorable Myron H. Bright, Senior United States Court Judge, 793 F.2d 954 (8th Cir. 1986).

Jurisdiction in the District Court is grounded in diversity removal (28 U.S.C. Section 1446) of a cause of action arising under Missouri law. Appellate jurisdiction is based upon 28 U.S.C. Section 1291.

SUMMARY OF ARGUMENT

The District Court has broad powers to determine matters of law. These powers, however, are not limitless. A Federal Court in diversity cases is bound to apply state substantive law in ruling upon questions controlled by State statutes. In the case at bar, the judgment that this action is time-barred ignored the test of ascertainability or discoverability of damages as a prerequisite to the accrual of a cause of action under R.S.Mo. 516.120(5). The Court found that "actual knowledge" of the fact of fraud was implied in Plaintiffs' postponement in March 1978, of attempts to implement the Inventory module on the Burroughs B-80 computer. Contrary to Plaitniffs view that a mere postponement took place, the Court held that full knowledge of Burroughs "dismal" failure was available to Plaintiffs on that date and that the postponement amounted to "abandonment" of the implementation effort.

Because of the mistrial, Plaintiffs were unable to present crucial expert testimony to show that damage, other than mere delay, was not ascertainable or discoverable in March, 1978. Indeed, the analysis by the Court at summary judgment shows that the Court realized that the question of timeliness was a matter of fact to be resolved by a jury.

By dismissing the action with prejudice where substantial relevant testimony had not been adduced, the Court invalidated by implication, the analysis of ascertainability required under Missouri law and improperly substituted its own imperfect knowledge of the relevant facts.

REASONS FOR GRANTING THE WRIT

The focus of the dissenting opinion in the Court of Appeals is Judge Regan's belief these Plaintiffs "knew" in March 1978 that they had been defrauded by Burroughs marketing representatives.[1] Plaintiff believes this conclusion as a matter of law was a matter of sharp dispute and not resolvable, under the circumstances, except by a jury with the aid of expert testimony. The dissent recognizes that no cogent reasoning supports Judge Regan's decision other than the selective concatenation of some five lines of deposition testimony culled by him from more than eighteen volumes of deposition testimony. The conclusion that the crucial inventory package was "abandoned" in March 1978 as a result of Burrough's "dismal failure" completely ignores the pleading and the evidence which show that the effort was merely postponed rather than abandoned at that time, and no inference of knowledge of failure can be fairly drawn from those facts.

What is lacking is recognition of the issue of "ascertainability of damage" as a factual predicate to the accrual of a cause of action under Missouri law.[2] Plaintiffs claimed that actual knowledge of the fraud was impossible in March 1978 due to the complexity of the system, and the crippling effect of a mid-installation change of vendor upon an already overwhelming back-up within the data processing department of the business. Coupled with Burroughs' active "cover-up" of their underlying blame for the situation and their "continued reassurances of success", Plaintiffs believe a jury might well agree that the fact of damages was not ascertainable at the time the implementa-

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[1] Opinion of the Eighth Circuit United States Court of Appeals [App. A-1].

[2] The Court of Appeals adopts the application of R.S.Mo. Section 516.120(5) to the facts of this case. The additional requirements that damages be capable of "ascertainment" is found in R.S.Mo. Section 516.100. [App. A-32].

tion of Inventory was postponed. In its prior determination that "discovery" was a matter for the jury,[3] the Court indeed demonstrated its recognition of the factual nature of the issue — a recognition it was compelled to deny in its final order of dismissal.[4] In his opinion denying summary judgment there is clear recognition of the potential lulling effect of Burroughs' "soothing reassurances" of eventual success particularly where the inventory package could not be separately evaluated. [App. A-21] Plaintiffs had prepared substantial evidence including expert testimony on the peculiar and formidable nature of computer failure analysis.[5] Armed with such evidence the jury could find that John Hoffman had, in 1978, only a suggestion of delay and not an awareness of total failure. It could find there was nothing for which he might sue at that time. He does not claim to have been totally unaware of problems in 1978; he certainly knew the agreed timetable for installation by Burroughs had not been met. He contends, nonetheless, he had no reason to believe Burroughs would not be ultimately successful. The very fact of the damages and not merely the extent thereof was incapable of ascertainment.

As observed in dissent, the conclusion that the "abandonment" of Inventory proves "knowledge" of failure "[c]annot be sustained as determinations made as a matter of law on undisputed facts...", [App. A-6] for whatever the extent of the Court's personal experience in data processing, it could not claim sufficient knowledge properly to evaluate the myriad parameters of uncertainty with which these Plaintiffs were fac-

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[3] Opinion on Motion for Summary Judgment [App. A-21]

[4] Order of Dismissal [App. A-13].

[5] Dr. Robert A. Benson, Dean, College of Information Technology, Washington University, St. Louis, Missouri. But for the declaration of mistrial, an offer of proof would supplement the record to rebut the court's prior order to strike his testimony.

ed. Expert testimony was essential in order to evaluate the reasonableness of Hoffman's inaction in light of the limitations on understanding imposed by the technical nature of the machines.

Both the District Court and the Court of Appeals relied solely upon the holding in *Alexander v. Perkin-Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984) per curiam, to reach the result that this lawsuit was time-barred, apparently solely because computers are the subject of both cases. Neither Court considered that *Perkin-Elmer* involved vendor representations whose falsity was immediately determinable at hardware-installation time whereas the instant case involves an agreed phased-installation plan of many months duration. *Perkin-Elmer* simply held where full performance can be ascertained (i.e. upon delivery of the hardware) a computer customer may not ignore full evidence of then existing non-performance. Where ascertainability of damage is the issue, as here, analysis pursuant to *Perkin-Elmer* merely begs the essential question.

A Federal Court is not free, in a diversity case, to engraft onto State Rules those modifications and exceptions which are not already part of that State's decisional law. *Day and Zimmerman v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3. Nor should the Federal Courts minimize or ignore substantive requirements which a state court is bound to consider. Whether the requirement is a question of "discoverability" or of "ascertainability", Missouri Courts would be required fully to consider evidence of fraudulent concealment in order to avoid the unjust result which would obtain if this cause of action in fraud accrued upon the mere manifestation of harm. More is required. There must exist at the time a practical remedy to which a Plaintiff may resort — a remedy unavailable to John Hoffmann in 1978. To scrap the B-80 and proceed with different hardware was simply not a viable alternative given the

monumental expense and difficulty associated with such a move.[6]

Missouri Courts have held the mere appearance of a faulty or defective condition does not establish that damages are capable of ascertainment. *Linn Reorganized School District v. Butler Manufacturing Company,* 672 S.W.2d 340 (Mo. banc 1984). Under some circumstances, moreover, the expectation of professional service may excuse a buyer from:

> "[I]ndependent laymen's investigation to ascertain whether their professional agent has done its job properly . . ." *Martin v. Crawley, Wade and Milstead* (Mo. 1985) 702 S.W.2d 57.

(quoting *Thorne v. Johnson,* 483 S.W.2d 658 at 663 (Mo.App. 1972).

The District Court's decision on "further consideration" [App. A-13] that Plaintiffs had acutal knowledge simply cannot be explained.[7] There was before the Court not a single reason to justify the change of view. The Amended Complaint did not retreat from the allegations of Burroughs "cover-up" of fraudulent concealment nor did it fail to include the circumstances of Burroughs' superior access to relevant failure-determination data as a defense to Plaintiff's failure to sue. [App. A-27, A-28] The conclusion is compelling that Judge

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[6] The proper date of "ascertainability" is November, 1982 when the purchase of substantially increased memory capacity exposed the fact of the inadequacy of the B-80 to perform as promised. During this period, Burroughs discontinued marketing the Inventory software to operate on B-80's with 64K memory capacity.

[7] The dissenting opinion notes that the issue of limitations was not, in fact, properly before the district court. [App. A-5] Nevertheless, the direction to particularize was directed solely to the facts and circumstances of the subsequent reassurances by Burroughs — there was no direction to re-plead the issue of "ascertainability". [App. A-22].

Regan placed total reliance upon his own evaluation of the truncated testimonial record to reach the conclusion these Plaintiffs had actual knowledge of the fraud. His assertion that "[P]laintiffs have had the benefit of all their trial evidence" [App. A-8] is simply not true for their most dramatic and relevant proofs were never reached.[8]

CONCLUSION

The District Court refused to entertain evidence from which the timeliness of this action could be determined. It has ruled, without foundation, that no facts could possibly overcome the implication of proof of knowledge found in the March 1978 decision to delay implementation of the Inventory module.

In reversing its ruling that the fact of discovery is for the jury, Judge Regan has deprived these Plaintiffs of an opportunity provided them under Missouri law to demonstrate their diligence to pursue this claim.

Respectfully submitted,

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Attorneys for Plaintiffs

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[8] The opinion of the majority in the Court of Appeals that "all but one of Plaintiffs' witnesses had testified" [App. A-2] is unwarranted. That conclusion trivializes the relevance of the testimony of Ralph Layton, CPA, whose first-hand knowledge of the circumstances of misrepresentation was substantial.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2419

St. Louis Home Insulators, John Hoffman,
Paul Hoffman, Gene Whitehead, Robert Gryzmala,
David Maddox, d/b/a The Bear Company,
Appellants,

v.

Burroughs Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: October 15, 1985

Filed: June 18, 1986

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

Plaintiffs appeal from a judgment of the district court[1] dismissing with prejudice their action against defendant, Burroughs Corporation (Burroughs). We affirm.

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[1] The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri.

Plaintiff St. Louis Home Insulators is one of several commercial insulation businesses developed by plaintiffs John Hoffman, Paul Hoffman, Gene Whitehead, Robert Gryzmala, and David Maddox, doing business as the Bear Company, a partnership formed to coordinate their businesses' computer systems. Burroughs is a manufacturer and distributor of computer products and services.

St. Louis Home Insulators entered into agreements with Burroughs in April and June of 1977 for the purchase of five B-80 computers and the accompanying software, which included accounts receivable, invoicing, inventory control, inventory management, payroll, general ledger, and accounts payable.

Burroughs installed the first B-80 computer in September of 1977. Two more B-80 computers were installed by the end of 1977. St. Louis Home Insulators refused delivery of the remaining two B-80 computers because of continued difficulties with the hardware and software. Burroughs first encountered problems with the installation of the inventory program in November of 1977. Despite repeated attempts on the part of Burroughs and St. Louis Home Insulators to rectify the problems, St. Louis Home Insulators ultimately abandoned the inventory program in March of 1978. Furthermore, Burroughs delayed installing the invoicing and accounts receivable programs, which were supposed to be installed in March of 1978, until the latter half of 1978.

Plaintiffs filed a three-count complaint against Burroughs on June 20, 1983, alleging negligent misrepresentation, fraud, and breach of warranty in the sale of the computers. Burroughs moved for summary judgment on the negligent misrepresentation claim as barred by the statute of limitations, or, in the alternative, for failure to state a claim upon which relief could be granted, and for summary judgment on the fraud and breach of warranty claims as barred by the statute of limitations. The motion was taken with the case. There was a mistrial after all but one of plaintiffs' witnesses had testified. The district court took

the motion under submission and on August 16, 1984, granted Burroughs' motion to dismiss with prejudice with respect to the claims for negligent misrepresentation and breach of warranty on the ground that the respective statutes of limitations had run on those claims. The district court held that the fraud claim had not been adequately pleaded and ordered plaintiffs to file an amended complaint in compliance with Fed. R. Civ. P. 9(b). On September 17, 1984, Burroughs filed a motion to dismiss the amended complaint for failing to state a claim for relief and for failing to plead in accordance with Fed. R. Civ. P. 9(b). On October 5, 1984, the district court dismissed with prejudice the fraud claim on the ground that it had not been pleaded with the specificity required by Fed. R. Civ. P. 9(b) and for the further reason that it was barred by the statute of limitations.

The parties agree that Missouri law governs this action. The pertinent statute is Mo. Rev. Stat. § 516.120(5), which has been construed to mean that plaintiffs must bring suit within five years "from the date they knew or should have known the controlling facts" constituting the fraud. *Harding v. Modern Income Life Insurance Company,* 593 S.W.2d 568, 571 (Mo. Ct. App. 1979). *See also Alexander v. Perkin Elmer Corp.,* 729 F.2d 576, 578 (8th Cir. 1984) (per curiam). In its order of October 5, 1984, the district court found that plaintiffs had actual knowledge of the inadequacies in the inventory program and of Burroughs' failure to remedy those inadequacies long before the five-year limitations period had elapsed. Accordingly, the district court held plaintiffs' claim on the fraud count to be time barred.

The pretrial deposition testimony reveals plaintiffs' early knowledge of the alleged misrepresentations. Jan Holder, who was the chief computer operator for St. Louis Home Insulators in 1977 and 1978, testified that she "gave up" on the inventory program in March of 1978 and that neither she nor anyone else ever contacted Burroughs again about the program. Plaintiff Gryzmala testified that he had grown disillusioned with the

system and "was ready to get rid of it in the spring of '78." Plaintiff John Hoffman, president of St. Louis Home Insulators, testified that he had experienced a pattern of serious problems with the hardware and software at least as early as May of 1978. From this testimony, as well as from the testimony presented at trial, the trial court concluded that:

> Plaintiffs are sophisticated business men. Long before the crucial date, they knew that all attempts to modify the inventory programs and correct the problems had dismally failed. That futile attempts had been made to modify the inventory programs in order to comply with the original alleged representation would conceivably support a finding of breach of warranty, but not of fraud.

We conclude that the present case is closely similar on its facts to the situation presented in *Alexander, supra.* There, the purchaser of a computer and accompanying software acknowledged that it had experienced difficulties with the hardware and the software well before the five-year limitation period contained in § 516.120(5) had run. We concluded that the purchaser had thus been put on notice of the seller's misrepresentations more than five years before the suit was filed.

The holding in *Alexander* applies with equal force to this case. The record establishes unequivocally that plaintiffs had knowledge as early as March of 1978 that the inventory software program was not operating satisfactorily and could not be made to operate satisfactorily. Accordingly, the district court correctly entered summary judgment on the ground that the fraud claim was time barred.

In view of our holding, we need not discuss the alternative basis upon which the district court dismissed the action.

The judgment dismissing the action is affirmed.

BRIGHT, Senior Circuit Judge, dissenting.

I respectfully dissent.

The majority today concludes that the district court "correctly entered summary judgment on the ground that the fraud claim was time barred." Notwithstanding the majority's holding, however, the district court in this case did not grant a motion for summary judgment based on the running of the applicable statute of limitations. This suit had been in trial for three days when the district court declared a mistrial. At that time, the district court took under submission several motions of defendant, including a motion for summary judgment on plaintiffs' action for fraud based on the statute of limitations.

Two weeks after it declared the mistrial, the district court denied the defendant's motion for summary judgment on the fraud claim, concluding that it "cannot say as a matter of law the plaintiffs knew or should have known of the inadequacies" of the Burroughs' computer system. The district court also stated that the plaintiffs' fraud claim had not been adequately pleaded and ordered plaintiffs to file an amended complaint in compliance with Federal Rule of Civil Procedure 9(b).

Following this ruling and the plaintiffs' filing of its first amended complaint, Burroughs brought a motion to dismiss on the ground that the complaint still failed to adequately plead the circumstances surrounding the alleged fraud. The district court concluded that the complaint did not aver fraud with the particularity required by Rule 9(b), and did not state the specific circumstances that would toll the running of the applicable statute of limitations. On this basis, and on this basis alone, the court granted Burroughs' motion to dismiss the complaint with prejudice.

On appeal from this order, therefore, we do not review the entry of a summary judgment based on the running of the statute of limitations. Although the district court referred to the prior motion for summary judgment brought by Burroughs,

the court did not have such a motion before it, and did not state that it was considering such a motion. Any discussion by the district court of the merits of the statute of limitations issue remains purely extraneous and outside our review. The district court granted only a motion to dismiss on Rule 9(b), and not a motion for summary judgment on the statute of limitations.

Moreover, even if I were to accept the proposition that the district court granted a summary judgment motion on the statute of limitations issue, I would still be forced to conclude that the district court erred in granting such a motion. In order to grant summary judgment on the basis of the statute of limitations, the passing of the limitations period must be established as a matter of law. In its memorandum and order dismissing plaintiffs' fraud claim, the court stated that the facts do not "permit a finding that plaintiffs either did not nor could not by the exercise of due diligence discover (prior to June 20, 1978) the facts demonstrating the falsity of the alleged representations." The court supported this conclusion by observing that plaintiffs "are sophisticated business men" who "knew that all attempts to modify the inventory programs and correct the problems had dismally failed." These conclusory statements cannot be sustained as determinations made as a matter of law on undisputed facts.

Thus, I do not believe that we should affirm the district court on an "alternative" holding that the statute of limitations barred the plaintiffs' claim of fraud. Moreover, I believe that the district court erred in dismissing the plaintiffs' complaint on the ground that it failed to plead fraud and the tolling of the statute of limitations with sufficient particularity. I would therefore reverse the judgment of the district court dismissing plaintiffs' complaint with prejudice, and remand for further proceedings.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-8C(B)

St. Louis Home Insulators, Inc., et al.,
Plaintiffs,

vs.

Burroughs Corporation,
Defendant.

MEMORANDUM AND ORDER

Before us is defendant's motion to dismiss plaintiffs' first amended complaint in which recovery is sought based on allegedly fraudulent misrepresentations inducing the purchase of a B-8 computer system.

By way of background: Plaintiffs' original complaint alleged, in addition to a fraud claim, claims based on alleged breaches of warranty and negligent misrepresentation. Defendant moved for summary judgment on all claims on the ground they were barred by limitations. The motion was taken with the case, trial of which commenced on July 30, 1984, but which ended in a mistrial on August 2, 1984, after all of plaintiffs' witnesses (other than an expert on damages) had testified. Following the mistrial, the motion for summary judgment was taken under submission.

On August 16, 1984, the Court entered its order sustaining defendant's motion as it related to plaintiffs' claims for breach of warranty and negligent misrepresentations, but overruled the motion as to the fraud claim, on the premise that the Court could not hold as a matter of law that the five year statute of limitations had not been tolled. The meritorious issue as to the

fraud claim limitations defense pertained to the time when the alleged fraud as to the adequacy of the performance of the computer was discovered or should have been discovered by plaintiffs, who contended that they relied on the continuous assurances of defendant that the problems would be corrected.

Concurrently with overruling the motion for summary judgment on the fraud claim, the Court held that such claim had not been adequately pleaded, and ordered plaintiffs to file an amended complaint in compliance with Rule 9(b) FRCP. Defendant's motion to dismiss puts in issue the sufficiency of the amended complaint to state the claim of fraud. We note that in drafting their amended complaint, plaintiffs had the benefit of all their trial evidence.

Rule 9(b) provides that in *all* averments of fraud, the *circumstances* constituting fraud shall be stated with *particularity*. In *Bennett v. Berg*, 685 F.2d 1053, 1062 (8 Cir. 1982), Judge Henley defined "circumstances", as used in Rule 9(b), to "include such matters as the time, place and contents of false representations, as well as the identity of the person making the representation and what was obtained or given up thereby."

The amended complaint alleges (as did the original in identical language) that "on or about April, 1977" Plaintiffs requested of Defendant a proposal for products and services to perform seven specified "operational elements" (of which "inventory control" was one), and that Defendant proposed that Plaintiffs purchase certain listed equipment and services. The time of defendant's proposal and the manner in which it was made (oral or in writing, etc.) and the content of the proposal have not been stated.

In their response to defendant's motion to dismiss, plaintiffs state that the complaint "and the evidence" disclose a series of meetings and demonstrations in 1976 and 1977 at which the specific software programs ordered by Plaintiffs were discussed. Nothing in the complaint so states. Plaintiffs then add (with no specifics as to time or manner) that defendant "promised and

agreed that Inventory Control Reports would be produced by the B-80 computer and that it would do whatever necessary to assure that the inventory control programs would run on the specific B-80 model proposed." And in their so-called "more definite statement" attached to their response plaintiffs state that "during the period January through May, 1977" (May is the month the computer purchase was made) certain representations were made at the office of defendant in University City, Missouri, by agents of defendant (only one of whom is identified). Again, the complaint does not so state.

The alleged representations (as set forth in the "more definite statement") are two in numbers, (1) that the B-80 computer and its software "would convert Plaintiffs' business records into a report group entitled "Inventory Control and Management, Payroll, Accounts Receivable, Accounts Payable, General Ledger and Invoicing", and (2) that the B-80 hardware and software had been tested by defendant and would produce accurate reports from each of the six programs and defendant would make any modifications necessary to produce that result.

As pleaded in Paragraph 8 of the Amended Complaint, the alleged representations (at a time, place and in a manner *not* set forth) were that the hardware and software it proposed (1) were adequate in size and capacity to perform the operational elements, (2) were fully engineered, tested, debugged and operational at time of sale, (3) that the Inventory Control and Management Programs *could* be modified to meet Plaintiffs' requirements, (4) that the Inventory Control and Management Programs *would* be modified by defendant to meet Plaintiffs' requirements, (5) that the software programs *would* be installed in a nine-month period from the date of installation, and (6) that defendant *would* maintain, repair or replace any defective hardware or programs.

The amended complaint then alleges in Paragraph 9 that the aforesaid representations were false in that (1) the hardware products were inadequate to perform Plaintiffs' applications,

by reason of their inadequate memory size and data storage capacity, (2) the hardware and software products were defective and incapable of performing Plaintiffs' applications by reason of defective design and/or manufacturing procedures and incomplete or inadequate testing, and (3) the Inventory Control and Management Programs were not modified or installed for Plaintiffs' use.

In our judgment, the *pleaded* fraud does not sufficiently set forth the circumstances thereof as required by Rule 9(b). And in determining the motion to dismiss we can look *only* to the allegations of the complaint. Wholly irrelevant is plaintiffs' argument that defendant has heard the testimony of their witnesses and so should be aware of the details of plaintiffs' claim and the circumstances of the alleged fraud. We add that even we are not so aware.

It is further obvious that the Paragraph 9 allegation of falsity of the representations cannot apply to all of the six alleged representations, e.g., that the software programs would be installed within 9 months from the date of installation. In addition, some of the alleged representations relate to promises of future actions, the non-performance of which would not of itself be fraudulent under Missouri law. We are, of course, aware that although a state of mind as to future performance or conduct may be misrepresented and so become actionable, that is not the case alleged or even shown by plaintiffs' evidence. Hence, all that plaintiffs allege as to allegedly actionable *false* representations inducing the purchase is that the equipment sold by defendant was (1) *inadequate* to perform plaintiffs' applications and (2) that said equipment was defective and *incapable* of performing plaintiffs' applications, as the result of defective design and incomplete and inadequate testing.

Of importance also is plaintiffs' further allegation (Paragraph 18) that their "decision to purchase the Burroughs B-80's was made *solely* because of the representations that the 7 program elements would be successfully installed and that the

B-80 hardware was adequately tested and operational." Thereby, plaintiffs have narrowed the number of alleged misrepresentations on which they allegedly relied. We add that their proposed instructions for use in the trial set for October 1, 1984, plaintiffs submit only allged false representations: (1) that defendant *would* provide operational programs for *inventory* control that would produce inventory reports in the B-80 computers, and (2) that the B-80 hardware *would* be tested prior to installation, thus further narrowing the issues.

Over and beyond the foregoing is the ever-present question of limitations. Unquestionably, this action was instituted more than five years after the alleged fraud occurred, so that to overcome this hurdle, it is essential for plaintiffs to demonstrate that their cause of action accrued at a later date. Under Missouri law, the five year statute does not begin to run (and the cause of action is not deemed to have accrued) until the aggrieved discovered (or should have discovered) the facts constituting the fraud.

As held in *Kuenke v. Jeggle,* 658 S.W.2d 516, 518 (Mo. App. 1983), "When discovery is relied on to toll the statute, the pleading should aver when it was made and *why* it was not made sooner." See also *Womack v. Calloway County,* 159 S.W.2d 630, 632 (Mo. Sup. 1942). The amended complaint alleges, without more (Paragraph 19), that "(o)n or about February 1982 Plaintiffs discovered that the failures of the B-80 system were the result of Burroughs' initial false representations as to the capability of the 64K B-80 with mini-disks to perform the promised applications."

In the original complaint plaintiffs alleged that "*on* January 30, 1983, plaintiffs discovered that the management system could not be achieved. Even in their response to defendant's motion, plaintiffs have not explained the change in the alleged date of the discovery. More importantly, whatever the date, the amended complaint is wholly silent on the crucial question of *why* the facts could not, by the exercise of due diligence, have

been discovered within the five year period. A complaint which fails to plead due diligence in other than conclusory language is insufficient.

We note that in plaintiffs' "more definite statement", (which is no part of the amended complaint), they assert, without amplification, that they *could not* discover that the representations were untrue "until they completed the purchase and installation of additional equipment on or about February 1982" and that on that date they "gained *final* knowledge that the B-80 system originally proposed possessed inadequate memory and data storage capacity to produce the reports promised by Defendants." Even this assertion is insufficient to meet the requirements of demonstrating *why* in the exercise of due diligence they *could not* have made the discovery long before.

It follows that the motion to dismiss is well taken and should be sustained. Defendant urges that the dismissal should be with prejudice, and we next turn to that question.

As a general rule, in the interest of justice, a plaintiff should be permitted to amend his pleading to cure deficiencies. Plaintiffs have already been given that opportunity and the amended complaint is the result. Here, unlike the usual situation, the amended complaint was filed at our direction *after* discovery had been completed and *after* plaintiffs had virtually completed the presentation of their evidence. Assuming that such evidence is sufficient to withstand a motion for a directed verdict, plaintiffs have given us no explanation for their failure to state a claim based thereon in accordance with the law.

As we view the complaint, plaintiffs have taken their claim for breach of warranty (which we have held is barred by limitations) and attempted to dress it up in the trappings of fraud. We have held that as against the motion to dismiss plaintiffs have failed to do so.

In ruling whether justice requires that the dismissal should be without prejudice, we also consider the nature and legal suffi-

ciency of the evidence adduced by plaintiffs on the trial as well as the basis of our prior holding denying summary judgment on the fraud claim. Because of the mistrial, defendant had no opportunity to move for a directed verdict. Much of the evidence pertained to the alleged breach of warranty and the claim of negligent misrepresentation. Parenthetically, we note that even in their present attempt to state a claim limited to fraud, plaintiffs have interwoven allegations pertinent only to breach of warranty. Thus, in Paragraph 20 plaintiffs allege that they have sustained damages as a result not merely of the allegedly false representations of B-80 capabilities, but also as a result of defendant's "failure to replace and repair defective hardware and software."

In denying summary judgment, we held that by reason of defendant's alleged assurances that it would correct the problems, there was a possibility a jury might find that the running of the statute of limitations had been tolled. Upon further consideration, however, in light of the trial evidence, we do not believe that the facts permit a finding that plaintiffs either did not nor could not by the exercise of due diligence discover (prior to June 20, 1978) the facts demonstrating the falsity of the alleged representations on the basis of which the purchase was made. Plaintiffs are sophisticated business men. Long before the crucial date, they knew that all attempts to modify the inventory programs and correct the problems had dismally failed. That futile attempts had been made to modify the inventory programs in order to comply with the original alleged representations would conceivably support a finding of breach of warranty, but not of fraud.

The situation presented by the evidence is wholly unlike that in *Swope v. Prinz,* 468 S.W.2d 34 (Mo. 1971). That was a medical malpractice case in which the evidence disclosed that the surgeon defendant had severed a nerve (a fact the patient plaintiff would not know) and not only concealed that fact from his layman patient but assured her she would recover (knowing she would not) and urged her not to seek other medical advice.

Here, long before the five year period had elapsed, plaintiffs actually *knew* of the inadequacies they complain of and the failure of the defendant to remedy them. They now say (in their response) that not until they installed additional equipment in February, 1982 did they gain "*final* knowledge" that the B-80 system originally proposed possessed inadequate memory and data storage capacity to produce the promised reports. Their evidence is to the contrary. The law requires parties to be alert and diligent. They may not shut their eyes to the facts (and the significance thereof) which disclose the alleged fraud. Plaintiffs' evidence clearly discloses that after acquiring actual knowledge of all the pertinent facts within the five year period of limitations, plaintiffs, experienced business men, simply slept upon whatever rights they had, both in contract and otherwise.

Plaintiffs have had ample opportunity to demonstrate that they have a submissible case. Defendant's motion to dismiss is hereby sustained. Under the circumstances, and in fairness to both parties, we are convinced that the dismissal should be and is hereby ordered to be with prejudice. Judgment will be entered in accordance herewith and with our prior order.

Dated this 5th day of October, 1984.

/s/ John K. Regan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-8C(B)

St. Louis Home Insulators, Inc., et al.,
Plaintiffs,

vs.

Burroughs Corporation,
Defendant.

JUDGMENT

The Court having this day entered its Memorandum and Order sustaining with prejudice defendant's motion to dismiss plaintiffs' amended complaint and having heretofore entered its Memorandum and Order dismissing with prejudice Counts I and III of plaintiffs' original complaint.

Now, Therefore, in accordance with said memorandum and orders and for the reasons stated therein,

IT IS HEREBY ORDERED and ADJUDGED that plaintiffs take nothing, and that plaintiffs' action and all claims asserted by plaintiffs in their said complaints be and the same are hereby DISMISSED WITH PREJUDICE.

Dated this 5th day of October, 1984.

/s/ John K. Regan
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-8C(B)

St. Louis Home Insulators, et al.,
Plaintiffs,

vs.

Burroughs Corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Aug. 16, 1984)

Before the Court is defendant's motion for summary jdugment.

This action stems from an agreement by plaintiff St. Louis Home Insulators to purchase five B-80 computers from defendant Burroughs Corporation. St. Louis Home Insulators is one of several commercial insulation businesses developed by plaintiffs John Hoffman, Paul Hoffman, Gene Whitehead, Robert Gryzmala and David Maddox. The Burroughs Corporation is a Michigan-based manufacturer and distributor of computer products and services.

The insulation businesses developed by John Hoffman and his associates had expanded to seven states by early 1977, prompting plaintiffs to consider the use of a business computer to streamline their operations and reduce costs. John Hoffman, who was also the President of St. Louis Home Insulators, assumed the responsibility of investigating potential computer supplies and selecting a product that would satisfy the needs of the business. After extensive research and deliberation, the plaintiffs agreed to purchase five B-80 computers from Bur-

roughs for use in their businesses around the country. The plaintiffs formed a partnership, the Bear Company, to own and coordinate the use of the computer systems for the benefit of the companies in which the partners held an interest.

In April and June of 1977, John Hoffman, as president of St. Louis Home Insulators, entered into two agreements with Burroughs. The first agreement was for the purchase of the hardware for the five B-80 computers, while the second was for the purchase of the necessary software for the system. The software package Burroughs was to supply included accounts receivable, invoicing, inventory control, inventory management, payroll, general ledger and accounts payable.

Burroughs installed the first B-80 computer at St. Louis Home Insulators in September, 1977, and began installation of the software immediately thereafter. The entire software package was to be installed on the St. Louis computer by March, 1983. Two more B-80 computers were installed in the plaintiffs' offices in Kansas City and Denver by the end of 1977, but, because of subsequent difficulties with the software, the plaintiffs never accepted delivery of the remaining two B-80s. Installation of the software programs on the St. Louis computer hit a snag in November, 1977 when Burroughs was unable to successfully install the inventory programs. Despite repeated attempts to rectify the problems with the system, the inventory programs were never installed on the computer. In addition, the invoicing and accounts receivable programs were not installed on the St. Louis computer until the latter half of 1978, despite an alleged promise by Burroughs to install the entire software package by March, 1978. In addition to problems with the software, the computers also suffered from numerous mechanical difficulties.

Contending that the computers failed to perform as represented, plaintiffs filed a three count complaint against Burroughs on June 20, 1983, alleging negligent misrepresentation, fraud and breach of warranty in the sale of the computers. Bur-

roughs counterclaimed for losses it sustained from plaintiffs' refusal to accept delivery of another computer, the B-1800, which plaintiffs allegedly agreed to purchase in 1979. Burroughs now seeks summary judgment contending that Count I of plaintiffs' complaint fails to state a cause of action and that, alternatively, all three counts are barred by the Statute of Limitations.

Count I of plaintiffs' complaint alleges that the B-80 computers were inadequate for the plaintiffs' needs and that Burroughs, who knew or should have known of these inadequacies, negligently misrepresented to plaintiffs that the computers would meet plaintiffs' needs. Plaintiffs allege that, as a result of these misrepresentations, they were damaged in the amount of $1,000,000.

Burroughs contends in its motion that plaintiffs must bring, in lieu of a claim for negligent misrepresentation, a claim for breach of warranty under the Uniform Commercial Code, and that, even if a negligent misrepresentation claim is permitted under Missouri law, it does not provide for recovery of purely economic loss absent some injury to person or property. We find, however, that defendant's contentions are nonmeritorious.

Missouri courts have consistently recognized a cause of action for negligent misrepresentation, repeatedly citing the Restatement of Torts (Second) §552 as the proper reflection of an action for negligent misrepresentation in Missouri. See *Ligon Specialized Hauler, Inc. v. Inland Container Corp.*, 581 S.W.2d 906 (Mo.App. 1977); *Volume Services, Inc. v. C. F. Murphy and Associates, Inc.*, 656 S.W.2d 785 (Mo.App. 1983). Furthermore, Missouri courts have not ruled, as defendant contends, that negligent misrepresentation and breach of warranty are mutually exclusive remedies. See *City of Warrensburg, Mo. v. RCA Corporation*, 571 F.Supp. 743 (E.D.Mo 1983). A claim for negligent misrepresentation, like a claim for fraudulent

misrepresentation, may be brought in addition to or in lieu of a claim for breach of warranty.

In addition, §552B of the Restatement clearly allows the recovery of purely economic loss in a negligent misrepresentation claim. Section 552B states that damages recoverable for negligent misrepresentation are those necessary to compensate the plaintiff for pecuniary loss, including the difference between the value plaintiff received in the transaction and its purchase price, plus any pecuniary loss suffered as a consequence of plaintiff's reliance on the misrepresentation. Contrary to defendant's contention, plaintiffs do not need to show personal or property injury as a prerequisite to recovery. Accordingly, we hold that, under Missouri law, plaintiffs have not failed to state a cause of action for negligent misrepresentation.

On the other hand, defendant's contention that Count I is barred by the statute of limitations is well taken. In Missouri, a cause of action for negligent misrepresentation must be brought within five years of its accrual. Mo.Rev.Stat. §516.120(4). Moreover, a claim for negligent misrepresentation accrues when the defendant breaches its duty and damages plaintiff, not (as plaintiffs contend) when plaintiffs discovered or should have discovered defendant's allegedly wrongful actions. *Kaufman v. C.R.A., Inc.*, 243 F.Supp. 721 (W.D.Mo. 1965).

Plaintiffs' complaint clearly indicates that defendants' alleged negligent misrepresentations (and, consequently, its breach of duty) were made prior to the sale of the five B-80s in the spring of 1977. Plaintiffs were damaged when they relied on these alleged misrepresentations and actually purchased the computers in the summer of 1977. Therefore, Count I of plaintiffs' complaint, filed in June, 1983 was untimely. Plaintiffs' allegations that they discovered the alleged deficiencies in the B-80 in January, 1983 is neither material nor controlling under *Kaufman*. Accordingly, Count I of plaintiffs' complaint is barred by the Statute of Limitations, and IT IS HEREBY ORDERED

that count I of plaintiffs' complaint be and the same is hereby DISMISSED WITH PREJUDICE.

Count II of plaintiffs' complaint, which defendant contends is also barred by the Statute of Limitations, alleges that defendant's representations regarding the "ability of the equipment to perform" constituted fraudulent misrepresentation. In Missouri a cause of action for fraud, like negligent misrepresentation, must be brought within five years of its accrual. Unlike negligent misrepresentation, however, a claim for fraud does not accrue until the aggrieved party first discovers or should have discovered the alleged fraud. Mo.Rev.Stat. Section 516.120(5) Mo.Rev.Stat.; *Crawford v. Smith* 470 S.W.2d 529 (Mo. banc 1971). Furthermore, the statute of limitations may be tolled when the defendant, through some positive intentional act, conceals from the plaintiff the existence of a cause of action. Mo.Rev.Stat. Section 516.280.

Defendant contends that plaintiffs knew by at least March of 1978 that the B-80 computers were not going to perform as plaintiffs desired. As support for this contention defendant offers the deposition testimony of Jan Holder, the chief computer operator for St. Louis Home Insulators in 1977 and 1978. Ms. Holder testified that after the initial attempt to install the inventory programs failed in November 1977, she worked closely with the defendant over the next 6 months attempting to rectify the problems in the software. These efforts, however, proved futile. At the end of that six month period (March, 1978), Ms. Holder abandoned any further attempt to utilize the inventory program.

Defendant couples Ms. Holder's testimony with the deposition testimony of John Hoffman, who stated he had "serious problems" with the hardware and software before June 20, 1978, and Robert Gryzmala, who expressed his disappointment with the system by the spring of 1978, to conclude that by late spring of 1978, over five years before this action was filed, plaintiffs knew that their system would not perform as desired.

Plaintiffs counter this argument by alleging that the defendant continually reassured plaintiffs that the inventory programs would be modified and adopted for use in the B-80. These assurances, plaintiff contends, tolls the statute of limitations.

It is clear from the deposition testimony of Jan Holder that the inventory programs failed to perform properly when initially installed, and thereafter the defendant and the plaintiffs worked closely together to rectify the problems in the system. Although Jan Holder testified that the plaintiffs abandoned the use of the inventory program some time in the spring of 1978, there remained at that time two more programs (accounts receivable and invoicing) to be installed on the computer. Without those programs on the computer, the plaintiffs had no sure method of determining just how well the total software package would perform. Moreover, Burroughs had allegedly promised to install the entire software package by the spring of 1978. When it became clear to Burroughs that these two programs would not be installed on schedule, Burroughs undoubtedly assured the plaintiffs that the programs would be forthcoming. This fact is evidenced by a letter from John Hoffman to Burroughs on June 21, 1978, expressing his dissatisfaction with the schedule of delivery. If, after the initial failure of the inventory programs, the defendant continually assured the plaintiffs that the enire software program would be successfully installed (albeit untimely), its action would toll the rerunning of the statute of limitation beyond June 20, 1978. See *Swope v. Prinz,* 468 S.W.2d 34 (Mo. 1971). Consequently, we cannot say that as a matter of law the plaintiffs knew or should have known of the inadequacies of the B-80 prior to June 20, 1978. That is a matter best left for the fact-finder. Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss count II be and the same is HEREBY OVERRULED.

We do find, however, that plaintiffs' complaint with regard to Count II is inadequate. Rule 9 requires that all averments of fraud be stated with particularity. Accordingly, IT IS HEREBY ORDERED that plaintiffs file an amended complaint to Count

II, detailing the circumstances surrounding the alleged fraud and the alleged fraudulent concealment with greater particularity.

Finally, Count III of plaintiffs' petition, although somewhat ambiguously drafted, states a claim for breach of warranty. Burroughs contends that any action for breach of warranty is barred by the warranty disclaimers in the sales contract signed by the parties or, alternatively, that this action is barred by the statute of limitations.

Addressing Burroughs' contention that this claim is barred by the statute of limitations, we note that the sales contract and accompanying warranty are governed by Missouri's Uniform Commercial Code (U.C.C.). Mo. Rev. Stat. Section 400.2-1023. Under the U.C.C., an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued; however, the parties may, by the original agreement, reduce the period of limitation to not less than one year. Mo.Rev.Stat. Section 400.2-725(1). Moreover, a cause of action for breach of warranty accrues when the tender of delivery is made or, if the warranty extends to future performance of the goods and discovery of the breach must await the time of performance, the cause of action accrues when the breach is or should have been discovered. Mo.Rev.Stat. Section 400.2-725(2).

In the case before us, the sales contract for the B-80 computers clearly states that no action may be commenced on any breach of the agreement more than two years after the action has accrued. Furthermore, this action accrued (at the very latest) in late 1978, when the final application programs were delivered by Burroughs and installed on the St. Louis computer. Consequently this action, which was filed in the summer of 1983, was not within the two-year statute of limitations agreed on by the parties. In view of the fact that this claim is barred by the statute of limitations, we find it unnecessary for us to deter-

mine the validity of the warranty disclaimers asserted by defendant.

Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss Count III of plaintiffs' complaint be and the same is HEREBY SUSTAINED.

Dated this 16th day of August, 1984.

John K. Regan
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-0008-C(B)

St. Louis Home Insulators, et al.,
Plaintiffs,

vs.

Burroughs Corporation,
Defendant.

FIRST AMENDED COMPLAINT

Count I

Come now Plaintiffs and for Count I, state to the Court as follows:

1. Plaintiff, St. Louis Home Insulators, is a corporation with its principal place of business in St. Louis County, Missouri and organized under the laws of the State of Missouri. Plaintiffs John Hoffman, Paul Hoffman, Gene Whitehead, Robert Gryzmala and David Maddox were at all time material herein members of a partnership known as The Bear Company, doing business under the laws of the State of Missouri and with its principal place of business in St. Louis County, Missouri.

2. Defendant, Burroughs Corporation, is a Michigan corporation with its principal place of business located in Detroit, Michigan and doing business and maintaining offices in the City and County of St. Louis, Missouri.

3. At all times material herein Plaintiffs were engaged in the business of distributing and installing products for the home insulation industry.

4. At all times material herein Defendant was engaged in the manufacturing and distribution of products and services for the information processing market.

5. On or about January, 1977 Plaintiffs began the implementation of an automated management information system for the purpose of reducing their costs of doing business and increasing control over financial matters.

6. Said management information system was designed to include the following necessary *OPERATIONAL ELEMENTS:*

a. General Ledger Accounting

b. Payroll Accounting

c. Accounts Receivable

d. Invoicing

e. Accounts Payable

f. Inventory Control

g. Cost Accounting

FRAUD

7. On or about April, 1977 Plaintiffs requested of Defendant a proposal for products and services to perform the *OPERATIONAL ELEMENTS* listed in paragraph 6 above, and Defendant proposed that Plaintiffs purchase the machines, program products, and associated products (hereinafter referred to as "The Equipment") and services set out as Exhibit "A" herein in order to perform those elements.

8. Burroughs represented further that the hardware and software it proposed:

a. Were adequate in size and capacity to perform the operational elements;

b. Were fully engineered, tested, debugged and operational at the time of sale. and that;

c. The Inventory Control and Management Programs could be modified to meet Plaintiffs' requirements.

d. The Inventory Control and Management Programs would be modified by Burroughs to meet Plaintiffs' requirements.

e. The software programs would be installed within a 9 month period from the date of installation.

f. Burroughs would maintain; repair or replace any defective hardware of programs.

9. Burroughs representations were false in that:

a. The hardware products were inadequate to perform Plaintiffs' applications in that:

1. The memory size (64k) was inadequate.

2. The data storage capacity of the Burroughs mini-disks was inadequate.

b. The hardware and software products were defective and incapable of performing Plaintiffs' applications as a result of:

1. Defective design and/or manufacturing procedures.

2. Incomplete or inadequate testing of the hardware and software products.

c. The Inventory Control and Management Programs were not modified or installed for Plaintiffs' use.

10. Defendant Burroughs knew their representations regarding the products and equipment were false, or made said representations recklessly without knowledge of their truth or falsity.

FRAUDULENT CONCEALMENT

11. Subsequent to the purchase of the products and equipment Defendant Burroughs continually represented that:

a. The software programs would be successfully implemented at a later date.

b. The Inventory Control and Management Programs would be successfully modified and installed.

c. The B-80 hardware failures were unique to Plaintiffs' location, and were the result of Plaintiffs' failure to provide a properly air-conditioned and dust-free environment.

12. The representations in paragraph 11 above were false in that:

a. The Inventory Control and Management Programs were never successfully installed.

b. The B-80 hardware failures were the result of defects in design and manufacture and inadequate testing by Burroughs.

13. Burroughs knew that the representations in paragraph 11 above were false or made the representations recklessly without knowledge of their truth or falsity, in that Burroughs knew:

a. B-80 systems with 64K of memory had failed to perform in numerous customer locations.

b. The B-80 mini-disk was inadequate for Plaintiffs' needs.

c. The proposed modifications to the Inventory Programs could not or would not be made.

d. B-80 failures in the nature of "clearstarting", and "going to sleep" were the result of the inadequacies and defects set out herein, and were not caused by any fault of Plaintiffs.

14. Burroughs made the continuing false reassurances and representations with the intent that Plaintiffs rely thereupon intending thereby that Plaintiffs remain unaware of the falsity of the representations made at the time of sale, and to conceal the fact of Burroughs non-performance and the existence of Plaintiffs' cause of action for breach of covenants and for misrepresentation.

15. Burroughs concealed its knowledge of B-80 inadequacies and failures for the further purpose of inducing Plaintiffs to purchase additional memory and additional disk capacity to perform the applications initially proposed for the B-80.

16. At the time of initial sale, and through the installation of additional hardware, Burroughs was in a position of superior knowledge as to the capability of its products and services, and Plaintiffs could not have known or discovered that the failures and delays were the result of Defendant's defective products and false representations as to the capability of those products.

17. Plaintiffs believed and relied upon the false representations of B-80 capabilities, and they believed and relied upon Burroughs' continuing representations after the 9 months installation schedule was not met by Burroughs.

18. Plaintiffs' decision to purchase to Burroughs B-80's was made solely because of the representations that the 7 program elements would be successfully installed and that the B-80 hardware was adequately tested and operational.

19. On or about February 1982 Plaintiffs discovered that the failures of the B-80 system were the result of Burroughs' initial false representations as to the capability of the 64K B-80 with mini-disks to perform the promised applications.

20. As a proximate result of Burroughs' false representations of B-80 capabilitites, their failure to modify and install the Inventory program, and their failure to replace or repair defective hardware and software, Plaintiffs were damaged in the amount

of One Million Three Hundred Thousand Dollars ($1,300,000.00).

WHEREFORE, Plaintiffs pray that they recover judgment against Burroughs Corporation for their damage in the sum of One Million Three Hundred Dollars ($1,300,000.00).

COUNT II

1. Plaintiffs hereby reallege, adopt, and incorporate paragraphs 1 through 20 of Count 1 as if fully set out herein.

21. Burroughs' initial false representations and promises regarding B-80 suitability and capabilities were made willfully, intentionally, without just cause or excuse, for Defendant's pecuniary interest in securing the sale, and without regard for the substantial risk of resulting damage to Plaintiffs.

22. Burroughs' subsequent promisies, reassurances and fraudulent concealment of B-80 defects were made willfully, intentionally and for the purpose of inducing Plaintiffs to forebear from the prosecution of their causes of action against Defendant.

23. At the end of 1983, Defendant Burroughs Corporation had a net worth in excess of Two Billion Dollars ($2,000,000,000.00).

WHEREFORE, Plaintiffs pray that they recover judgment against Defendant for punitive and exemplary damages in the amount of Ten Million Dollars ($10,000,000.00).

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EXHIBIT "A"

MACHINE SYSTEMS

One Burroughs B80-034-113 Systems:

IMHZ Processor

25.6" Console, 180cps

60KB memory

2 IMB Mini-Disks

160 LPM Printer

Tape Cassette

Display Screen

Four Burroughs B80-034-111 Systems:

IMHZ Processor

25.6" Console, 180 cps

2 IMB Mini-Disks

Display Screen

60KB Memory

PROGRAMMING SYSTEMS

CM 80 MCP

CM 80 UTL

B80 CPO

B80 CRO

B80 CGO

C80 CMO

B80 CCO

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2419-EM

St. Louis Insulators, et al.,
Appellants,

vs.

Burroughs Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 31, 1986

APPENDIX F

Statutes of the State of Missouri

Section 516.100 R.S.Mo. — Period of Limitation Prescribed

Civil actions, other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purpose of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Section 516.120(5) — What actions within 5 years.

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years of the facts constituting the fraud.